No. 35

Supreme Court of the United States

OCTOBER TERM, 1968

CARL F. GRUNENTHAL, *Petitioner*,

v.

THE LONG ISLAND RAIL ROAD COMPANY, *Respondent*.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is printed in the appendix (A. 59-68), and it is reported at 388 F.2d 480. The opinion of the United States District Court for the Southern District of New York (A. 54-58) is not reported.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on January 11, 1968. (A. 1). The petition for certiorari was filed on February 28, 1968, and was granted on May 6, 1968. (A. 2). The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Does the Seventh Amendment preclude an appellate court from reversing a trial judge who refuses to order a new trial or remittitur of excessive damages when the damages awarded by a jury are sustainable upon no rational view of the evidence?

(2) If not, does the Federal Employers' Liability Act, 45 U.S.C. § 51, restrict such appellate court action in cases brought under the Act?

(3) On the facts of this case, did the court below err in holding that the verdict was so grossly excessive that it should not be permitted to stand because "after giving Grunenthal the benefit of every doubt" the court could not "in any rational manner consistent with the evidence arrive at a sum in excess of $200,000"?[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Seventh Amendment to the Constitution of the United States and Section 1 of the Federal Employers' Liability Act, 45 U.S.C. § 51, are set forth at page 2 of the petitioner's brief.

STATEMENT

The petitioner filed a complaint under the Federal Employers' Liability Act (hereinafter "FELA") to recover $250,000 damages for personal injuries sustained in the course of his employment.

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[1] In his petition for certiorari, the petitioner raised a fourth question concerning the power of the Court of Appeals to order a new trial on the issue of liability as well as damages. In view of the respondent's interpretation of the mandate below as requiring a new trial on damages only, the petitioner no longer urges that question upon the Court. Petitioner's Brief (hereinafter "Br.") p. 29.

Trial was to a jury, and by agreement the liability and damage issues were tried separately. (A. 3). The jury found against the respondent on the question of liability. (A. 3). No issues concerning liability are now before the Court.

Following the verdict on liability, the damage issues were tried to the same jury. The petitioner relied primarily upon two witnesses, Dr. Cohen, who testified as to his physical condition (A. 4-26), and the petitioner himself who testified as to both the pain and suffering he had experienced as a result of his injury and the efforts he had made to obtain employment following the accident. (A. 31-48). The respondent called no witnesses. (R. 548).

Dr. Cohen described the petitioner's injury as having been caused by a railroad tie that slipped and fell on his foot. (A. 6). The injury itself was a compound fracture that involved the crushing and shattering of the great toe joint of his right foot and accompanying fractures of the metatarsal and the second metatarsal. (A. 6). The witness also described the complications that the petitioner had experienced with respect to this injury (A. 6-14), but testified that at the time of trial the condition of the foot had improved. (A. 14). In summary, he described the injury as "all in all . . . a poor functioning foot." (A. 19). The doctor stated that while the petitioner should not do heavy work on his feet (A. 20) he could work in sedentary capacities or in a job that required driving an automobile. (A. 23-24). Thus, in Dr. Cohen's view the petitioner was not totally and completely disabled. (A. 24).

The petitioner testified that he had worked for the railroad since he was 20 years old, being 45 at the time

of trial. (A. 31). During these years, the petitioner had engaged solely in "trackman work."[2] (A. 31). The petitioner described his efforts to obtain work prior to the trial and stated that for six months or a year before trial he had held a custodial job, working a couple of days a week. (A. 38-39). He also described the pain that he had experienced from his injury, likening it to a "dull toothache" (A. 37), that becomes more painful in damp weather. (A. 39). He stated that it had been "bearable," being something that he now takes for granted, without letting it bother him. (A. 40).

Following this testimony and the instructions of the trial court on damages, the jury returned an award of $305,000. (A. 49). The respondent attacked this verdict on the ground that it was excessive. (A. 49, 51-53). The respondent's motions for relief were denied (A. 58), and judgment was entered on the verdict after the petitioner was allowed to amend the claim for damages in his complaint from $250,000 to $305,000 to comprehend the jury's award. (A. 59).

The respondent appealed to the Court of Appeals for the Second Circuit upon the ground, among others, that the verdict was grossly excessive.[3] (A. 2). The Court of Appeals announced that in dealing with this claim it would apply the standard it had previously established in *Dagnello* v. *Long Is. R. R.*, 289 F.2d 797 (1961). (A. 64). Thus, after "giving [the petitioner]

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[2] Subsequently, the petitioner's counsel offered in evidence the respondent's answer to an interrogatory that indicated the petitioner had in the year of the accident earned $4,258.87 through the 19th of September. (A. 48).

[3] The other grounds of appeal are no longer in issue.

the benefit of every doubt" it held that it could not "in any rational manner consistent with the evidence arrive at a sum in excess of $200,000" as compensation for the petitioner's injuries. (A. 66). Accordingly, the Court of Appeals ordered that the petitioner be given the option of remitting the part of his verdict that exceeded $200,000 or taking a new trial. (A. 66). The petitioner seeks review of this ruling.

SUMMARY OF ARGUMENT

I

The Seventh Amendment does not deprive an appellate court of power to review the refusal of a trial court to grant a motion for a new trial based on the amount of the verdict, for in exercising this power the appellate court only inquires whether the verdict is excessive or inadequate as a matter of law because there is no evidence that provides a rational basis for the amount of the verdict. The court below applied this legal standard. It gave the petitioner "the benefit of every doubt" and sought "any rational manner consistent with the evidence" to justify his verdict. This legal standard is the same one that permits an appellate court to enter judgment *n.o.v.*, and this Court has recently held that appellate action under this standard is not forbidden by the Seventh Amendment. *Neely* v. *Eby Const. Co.*, 386 U.S. 317.

All eleven of the courts of appeals have held that they have the power to order a new trial or a remittitur if they find that a verdict is excessive as a matter of law. These decisions are not in conflict with any controlling decisions of this Court interpreting and applying the Seventh Amendment. The suggestion by petitioner that the early opinions of this Court establish

a rigid and absolute constitutional prohibition against the appellate power here in issue is inconsistent with later statements of this Court. See *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 482; *Affolder* v. *New York, C. & St.L. R.R.*, 339 U.S. 96; *Neese* v. *Southern Railway*, 350 U.S. 77.

Since petitioner must concede that a trial court is not precluded by the Seventh Amendment from ordering a new trial or a remittitur on the ground that the amount of the verdict is excessive, he is necessarily driven to the position that an appellate court lacks this power because it was not a power exercised by appellate courts at common law prior to the adoption of the Amendment. There is no merit in this argument from history. The Seventh Amendment does not impose as constitutional limitations all of the intricacies and formalities of common law procedure, but preserves the substance of the right to a jury trial. *Gasoline Prods. Co.* v. *Chaplin Ref. Co.*, 283 U.S. 494. Thus the remittitur itself, which was unknown at common law, is not forbidden by the Seventh Amendment because it is not an interference with the substance of the right protected by that Amendment. At common law prior to the adoption of the Amendment motions for new trials were heard by four judges of the Court of King's Bench sitting *en banc*. Review by a court of appeals of the action of a trial judge in ruling on a motion for a new trial does not therefore differ in effect or substance from the common law practice and is not inconsistent with the Seventh Amendment.

The petitioner's contention that judicial policy requires the constitutional limitation for which he argues is refuted by the practice of all eleven federal Courts

of Appeals that have successfully exercised the appellate power here in question.

II

Petitioner's argument that the FELA imposes special restrictions upon appellate review of decisions denying motions for a new trial on the ground that the verdict is excessive is not supported by any authority. "[T]he system of judicial supervision still exists in this as in other types of cases." *Harris v. Pennsylvania R.R.*, 361 U.S. 15, 17 (Mr. Justice Douglas, concurring). The courts of appeals in determining whether a trial court erred in denying a motion for a new trial based on the claim that the verdict was excessive have applied the same standards in FELA cases as they have applied in other civil actions.

Petitioner's argument cannot logically be confined in its application to the power of appellate courts in FELA cases. It is an argument that strikes equally at the power of the trial court and is in substance a contention that under the FELA any evidence of injury no matter how small justifies any award of damages no matter how large or irrational it may be and that the amount of the jury verdict is, for all practical purposes, immune from any judicial supervision or control. This position is not supported by the cases petitioner cites. Those cases hold that slight evidence is sufficient to sustain a jury verdict on liability, and they are explained by the fact that under the statute substantive liability with respect to any work-related injury is strict and indeed approaches the absolute. That fact, however, does not support petitioner's argument that there is and should be no effective judicial supervision over the amount of dam-

ages. Moreover, petitioner's argument overlooks the consistent use of remittiturs in FELA cases. *Neese* v. *Southern Ry., supra.*

III

The Court of Appeals properly held that there was no evidence, even when the record was read in the light most favorable to the petitioner, that would provide a reasonable basis for a verdict in the amount of $305,000. The complaint did not seek damages in that amount, nor did counsel for the petitioner in his summation ask the jury for that sum. Petitioner's own witness testified that he was not totally and completely disabled, but that he was capable of performing certain types of remunerative labor, and the petitioner himself stated that he had worked for six months or a year prior to trial. Petitioner on direct examination testified that the pain and suffering he experienced was "bearable" and something that he "take[s] . . . for granted now."

Accepting all this evidence at face value and giving the petitioner the benefit of all inferences therefrom, the Court of Appeals correctly held that there was no rational manner in which it could sustain the amount of the award which the jury had given. The Court of Appeals was therefore bound as a matter of law to declare that the verdict was excessive.

ARGUMENT

I. THE SEVENTH AMENDMENT DOES NOT DEPRIVE AN APPELLATE COURT OF AUTHORITY TO REVIEW A TRIAL COURT'S DENIAL OF A MOTION FOR A NEW TRIAL BASED ON THE GROUND THAT THE VERDICT WAS EXCESSIVE.

The petitioner contends that the Seventh Amendment prohibits any appellate review of a trial judge's denial of a motion for a new trial based on the amount of the verdict. This constitutional argument is directed solely to an asserted limitation on the power of appellate courts; petitioner does not suggest that a trial court lacks the authority to order a new trial or a remittitur on the ground that a verdict is excessive.[4] Indeed, the argument is that under the Seventh Amendment the authority of the trial court is absolute and that its denial of a motion for a new trial, whether based on a claim that the jury verdict was excessive or inadequate, is constitutionally insulated from any appellate supervision or control, even if the denial is an abuse of discretion.

All eleven federal Courts of Appeal in exercising the appellate power here in question have rejected arguments similar to petitioner's.[5] Petitioner argues that in so doing these courts have ignored and disregarded

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[4] The abundance of the authority in this Court precludes any suggestion that there is a lack of power generally in the federal courts to employ remittiturs to reduce a jury's verdict. Curtis Publishing Co. v. Butts, 388 U.S. 130, 160; Linn v. United Plant Guard Workers, 383 U.S. 53, 65-66; Neese v. Southern Ry., 350 U.S. 77; Affolder v. New York, C.&St.L.R.R., 339 U.S. 96; Dimick v. Schiedt, 293 U.S. 474, 484-85; Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69, 75; Northern Pac. R.R. v. Herbert, 116 U.S. 642, 646-47. See also Blunt v. Little, Fed. Cas. No. 1,578 (C.C.D. Mass. 1822) (Story, Circuit Justice).

[5] See p. 13, *infra*.

decisions of this Court which petitioner describes as controlling and which, he says, rest upon common law practice and procedure as it existed prior to the adoption of the Constitution. The petitioner is wrong on both grounds. The decisions of this Court interpreting and applying the Seventh Amendment do not support petitioner's position and the constitutional limitation petitioner seeks to derive from archaic common law practice and procedure is unjustified.

A. The Federal Courts of Appeals Have the Same Power To Review Motions for Remittiturs as They Have To Review Motions for Judgments Notwithstanding the Verdict.

In an opinion rendered less than two years ago, *Neely* v. *Eby Const. Co.*, 386 U.S. 317, this Court rejected a Seventh Amendment argument that only trial courts could enter judgments *n.o.v.*:

> "As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n.o.v.* than when a trial court does . . . ." 386 U.S. at 322.

Since the standard applied by appellate courts in reviewing remittiturs is precisely that used by them in reviewing judgments *n.o.v.*, it follows that the power confirmed in *Neely* controls disposition of the petitioner's Seventh Amendment contention in the present case.

The similarity between the action of the Second Circuit and that of a court of appeals reviewing the denial of a motion for judgment *n.o.v.* is plainly disclosed by the opinion below. The Court of Appeals, although "giving Grunenthal the benefit of every doubt," was unable "in any rational manner consistent with the evidence [to] arrive at a sum in excess of $200,000"

(A. 66), and therefore held the petitioner must accept a remittitur reducing his damages to that sum or face a new trial.

By giving the petitioner the benefit of every doubt, the court clearly indicated that it was not judging the credibility of his witnesses, but rather was accepting all their testimony.[6] By seeking to justify the jury's verdict "in any rational manner consistent with the evidence," the court below plainly gave all possible favorable inferences to the petitioner. Having done this, and still being unable to justify an award in excess of $200,000, the Court of Appeals found in effect that there was no evidence to support a recovery for the petitioner in excess of that sum.

This analysis is precisely the one employed by trial and appellate courts in passing upon motions for directed verdicts and for judgments *n.o.v.* See *e.g., Continental Co.* v. *Union Carbide,* 370 U.S. 690, 696, where this Court stated that the court of appeals in determining the sufficiency of evidence to take a case to a jury

> "was, of course, bound to view the evidence in the light most favorable to Continental and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn."

See also *Galloway* v. *United States,* 319 U.S. 372, 395. But when the evidence is so viewed and when "there can be but one reasonable conclusion as to the verdict," the court must grant a judgment *n.o.v. Brady* v. *South-*

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[6] The Court of Appeals could not have weighed the respondent's evidence on damages against the petitioner's, since the respondent called no witnesses on this issue. (R. 548).

ern Ry., 320 U.S. 476, 479-80. See also *Gunning* v. *Cooley*, 281 U.S. 90, 94; *Randall* v. *Baltimore & O.R.R.*, 109 U.S. 478, 482.

The petitioner objects that reviewing a district judge's denial of a motion for a new trial based upon the amount of the verdict constitutes review of the jury's findings of fact. (Br. 16-17). But the same argument could be made concerning review of a motion for judgment *n.o.v.* For the similarity between the issues of the sufficiency of evidence to sustain a finding of liability and the sufficiency of evidence to justify a particular damage award is readily apparent.

Thus, for example, in passing upon a defendant's motion for a directed verdict in a negligence case, the court views the evidence in the light most favorable to the plaintiff and determines whether a jury could on that evidence reasonably find as a matter of law that the defendant was negligent. In making this judgment the court has recourse to a principle of law—the reasonable man standard—and is not therefore engaged in a review of the facts as barred by the Seventh Amendment. *Walker* v. *Southern Pac. R.R.*, 165 U.S. 593, 596. Cf. Holmes, *The Common Law* 120-21 (1881).

By the same token, in approaching questions of remittitur in the manner below there is no review of facts. The court accepts the facts in the light most favorable to the plaintiff and decides whether the jury correctly applied the applicable legal standard—what is a reasonable award on those facts. If the jury did not correctly apply this legal standard, the court may set aside the plaintiff's award and order a new trial. Or it may, as the court below did here, offer him the option either of taking the verdict that is the highest possible under the proof he has produced or of taking a new trial.

The application of remittiturs by the test used below does not, therefore, involve an inquiry into the facts as found by the jury, but instead turns solely upon a question of law. There is, as a consequence, nothing in the Seventh Amendment that limits this inquiry by courts of appeals, and all eleven federal Courts of Appeals have so held. *Boyle* v. *Bond,* 187 F.2d 362 (D.C. Cir. 1951); *Compania Trasatlantica Espanola, S.A.* v. *Melendez Torres,* 358 F.2d 209 (1st Cir. 1966); *Russell* v. *Monongahela Ry.,* 262 F.2d 349, 352 (3d Cir. 1958); *Virginian Ry.* v. *Armentrout,* 166 F.2d 400 (4th Cir. 1948); *Glazer* v. *Glazer,* 374 F.2d 390 (5th Cir. 1967), *cert. denied,* 389 U.S. 831; *Gault* v. *Poor Sisters of St. Francis,* 375 F.2d 539, 547-48 (6th Cir. 1967); *Bucher* v. *Krause,* 200 F.2d 576, 586-87 (7th Cir. 1952), *cert. denied,* 345 U.S. 997; *Bankers Life & Cas. Co.* v. *Kirtley,* 307 F.2d 418 (8th Cir. 1962); *Covey Gas & Oil Co.* v. *Checketts,* 187 F.2d 561 (9th Cir. 1951); *Barnes* v. *Smith,* 305 F.2d 226, 228 (10th Cir. 1962).

The petitioner's contention with respect to appellate review of jury-found facts would perhaps have more weight if the courts of appeals applied the same test that is used by trial judges in ordering remittiturs. For trial judges can set aside a jury award on grounds of excessiveness when in their view, considering the demeanor of the witnesses tendered by the plaintiff, etc., the verdict is excessive as a matter of fact. *Williams* v. *Nichols,* 266 F.2d 389 (4th Cir. 1959); *Sunray Oil Corp.* v. *Allbritton,* 188 F.2d 751 (5th Cir. 1951) (concurring opinion). But the "teaching of *Dagnello* v. *Long Island R.R.,* 289 F.2d 797 (2d Cir. 1961)," which the Second Circuit applied in the instant case (A. 64), expressly recognizes the greater range of au-

thority that the trial judge has in passing upon questions of excessiveness and disclaims application by the Court of Appeals of that measure of review:

> "If we reverse, it must be because of an abuse of discretion. If the question of excessiveness is close or in balance, we must affirm. The very nature of the problem counsels restraint. Just as the trial judge is not called upon to say whether the amount is higher than he personally would have awarded, so are we appellate judges not to decide whether we would have set aside the verdict if we were presiding at the trial, but whether the amount is so high that it would be a denial of justice to permit it to stand. We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law." 289 F.2d at 806.

In the instant case, the Second Circuit reversed the District Judge solely because there was no rational view of the evidence that would support an award of $305,000. Had the court viewed the award as being merely excessive in fact, because it questioned the validity of the petitioner's evidence, it would have been forced to affirm the District Judge's denial of the new trial motion on the ground that his action was taken within the scope of his discretion. But in the view of the Court of Appeals this verdict was excessive as a matter of law because there was no rational view of the evidence that could sustain it, and the refusal of the District Judge to set aside the verdict was accordingly not an act within the scope of his discretion. His ruling was therefore an abuse of discretion constituting an error of law, and it raised an issue upon which the

Court of Appeals had power to act.[7] *Neely* v. *Eby Const. Co., supra.*

B. Decisions of This Court Do Not Limit the Power of Appellate Courts To Review Denials of New Trial Motions and Remittiturs When Damages Are Excessive as a Matter of Law.

The petitioner argues that this Court has consistently held that an appellate court is wholly without power to review trial court action concerning the excessiveness of a verdict. The 1879 case which is cited as the first to meet this issue, *Railroad Co.* v. *Fraloff,* 100 U.S. 24, does not support the petitioner. In that case, as in others which the petitioner cites as specifically stating the constitutional limitation (Br. 7),[8] this Court merely made clear that the Seventh Amendment precludes an appellate court from determining on its own view of the facts that a verdict is excessive. These cases did not hold a court of appeals that views the facts in the light most favorable to the plaintiff, but nevertheless concludes that the verdict is excessive as

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[7] The petitioner argues that, should this Court uphold the established practice of the courts of appeals to review the motions here in question, it should allow them to reverse district judges only when the jury's damage award is monstrous. (Br. 19). He suggests, however, that an award is monstrous only if "all mankind must be ready to exclaim against [it], at first blush," and then contends that since the trial judge in the present case did not exclaim against the jury award at first blush it could not be monstrous.

Under this test no judge could ever be reversed, since by approving or rendering a particular award, the judge or jury being a part of "all mankind" would make the test inoperative. Petitioner's argument is therefore simply a re-statement of his basic position that the action of a trial court in denying a motion for a new trial based on the amount of the verdict is subject to no appellate supervision whatsoever.

[8] Wabash Ry. v. McD[illegible], 107 U.S. 454; Metropolitan R.R. v. Moore, 121 U.S. 558; L[illegible] Power, 151 U.S. 436.

a matter of law, cannot reverse a trial judge's denial of a motion for a new trial. Indeed, the *Fraloff* opinion itself draws the very distinction which the petitioner ignores:

> "[O]ur power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury . . . ." 100 U.S. at 31.

Moreover, in a case that followed the ones upon which the petitioner primarily relies, *Walker* v. *Southern Pac. R.R.*, 165 U.S. 593, this Court marked a turning point in its attitude toward the Amendment. The Court held that a judgment *n.o.v.* could be entered consistently with the Seventh Amendment when the jury's answers to special interrogatories were inconsistent with the general verdict. The Court stressed the aim of the Amendment

> "is not to preserve mere matters of form and procedure but substance of right . . . . So long as this substance of right is preserved the procedure by which this result shall be reached is wholly within the discretion of the legislature . . . ." 165 U.S. at 596.

None of the post-*Walker* cases which the petitioner relies upon articulated a Seventh Amendment rationale. Some relied upon the limitations imposed upon appellate review by the writ of error,[9] while others dealt with review of cases decided in state courts, where, of course, there were no Seventh Amendment limitations upon lower appellate courts.[10]

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[9] Southern Ry. v. Bennett, 233 U.S. 80; Herencia v. Guzman, 219 U.S. 44.

[10] Louisville & N.R.R. v. Holloway, 246 U.S. 525; St.LouisI.M.& S.Ry v. Craft, 237 U.S. 648.

Thus, by the time of the decision in *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, Mr. Justice Brandeis was justified in saying:

> "[The non-review rule's] early formulation . . . was influenced by the Judiciary Act of 1789, which provided in § 22 that there should be 'no reversal . . . on such writ of error . . . for any error in fact.' Sometimes the rule has been rested on . . . the Seventh Amendment . . . . More frequently the reason given for the denial of review is that the granting or refusing of a motion for a new trial is a matter within the discretion of the trial court." 287 U.S. at 481-82.

And *Fairmount* explicitly left open the propriety of reversing a district judge for an abuse of discretion. 287 U.S. at 485.

Only a few years later in *Dimick* v. *Schiedt*, 293 U.S. 474, this Court determined that a district judge did not have absolute discretion in denying new trial motions. In that case a court of appeals was affirmed for reversing a district judge's denial of a new trial when the district judge had done so because the defendant agreed to an additur of the plaintiff's damages. Mr. Justice Stone, although dissenting from the Court's disapproval of additurs, noted his agreement with its broadening of review of trial judge action:

> "If the effect of what is now decided is to liberalize the traditional common law practice so that the denial of a motion for a new trial, made on the ground that the verdict is excessive or inadequate, is subject to some sort of appellate review, the change need not be regarded as unwelcome, even though no statute has authorized it." 293 U.S. at 489.

It is noteworthy that Mr. Justice Brandeis, the author of *Fairmount*, joined this dissent, as did Chief Justice Hughes and Mr. Justice Cardozo, and therefore welcomed the liberalization which petitioner claims was foreclosed by the *Fairmount* decision.[11]

Affolder v. *New York, C.&St.L.R.R.*, 339 U.S. 96, which upheld the district judge's denial of a new trial on the ground that the verdict returned by the jury was not "monstrous," indicates clearly that the Court was no longer willing to close its eyes to the possibility of appellate review of new trial motions. Then, in *Neese* v. *Southern Ry.*, 350 U.S. 77, which the petitioner cites as the capstone of his chain of authority dating from 1879, the Court assumed *arguendo* that the Constitution allows judicial review of denials of new trial motions and examined the record to determine whether the district judge had abused his discretion. *Neese*, therefore, made it quite clear that the authority of the Nineteenth Century cases was an open question.

The petitioner overlooks what is in fact the culmination of the line of authority that he has cited. In *Neely* v. *Eby Const. Co.*, 386 U.S. 317, one of the possible obstacles that stood in opposition to the power of a court of appeals to enter a judgment *n.o.v.* was that Federal Rule 50 guaranteed a party who had prevailed

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[11] The present statute governing appellate review provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106.

Neeley v. Eby Const. Co., 386 U.S. 317, 322, stressed the breadth of this provision.

before a jury the right to make a new trial motion, in the event a judgment *n.o.v.* was granted. Thus, if appellate courts had no power to grant such motions, they could not grant judgments *n.o.v.* This Court dealt at length with that issue and concluded that courts of appeals have ample power to grant or deny new trial motions:

> "Quite properly, this Rule [50(d)] recognizes that the appellate court may prefer that the trial judge pass first upon the appellee's new trial suggestion. Nevertheless, consideration of the new trial question 'in the first instance' is lodged with the court of appeals." 386 U.S. at 323-24.
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> "In our view, therefore, Rule 50(d) makes express and adequate provision for the opportunity—which the plaintiff-appellee had without this rule—to present his grounds for a new trial in the event his verdict is set aside by the court of appeals . . . . [T]he court of appeals may make final disposition of the issue presented, except those which in its informed discretion should be reserved for the trial court." *Id.* at 329.

If the courts of appeals have this power to grant or deny new trials, they should *a fortiori* have the power to exercise the limited review here in issue.

C. Pre-Seventh Amendment Precedent Does Not Support Petitioner's Argument.

The pre-Seventh Amendment common law practice that the petitioner discusses at length (Br. 12-13) does not lessen the force of the modern authority with respect to appellate action upon motions for new trials.

The petitioner's Seventh Amendment argument must turn ultimately on characterizing the King's Bench *en*

banc as acting in a trial court capacity when it entertained motions for a new trial and not in the appellate capacity which the petitioner admits it had to pass upon certain other matters. Thus the petitioner asserts that "the definitive point is that the motion was passed upon by the *same court* in which the action was begun and in which it was tried." (Br. 12) (emphasis his). This is true only in the most formal and abstract sense. As the petitioner admits, the motion for a new trial was not committed to the sole discretion of the trial judge but on the contrary was heard and decided by a panel of four judges sitting *en banc* at Westminster, which might or might not include the trial judge. (Br. 12).

Whether the Court of King's Bench sitting *en banc* was regarded in the 17th and 18th centuries as exercising trial or appellate power when it passed on motions for new trials is perhaps of historical interest, but is certainly irrelevant for present purposes. The characterization of that court does not touch the substance of the right that is protected by the Seventh Amendment, and as this Court has held that Amendment guaranteed the essentials of trial by jury and did not perpetuate all the forms and intricacies of procedure that existed at common law.[12] *Gasoline Prods Co.* v. *Chaplin Ref. Co.*, 283 U.S. 494, 498; *Galloway* v. *United States*, 319 U.S. 372, 390.

These essentials have been carefully articulated: That the jury be composed of 12 men; that trial to the jury be supervised by the court; and that the verdict of the jury be unanimous. *Patton* v. *United States*, 281 U.S. 276, 288; *United States* v. *Wood*, 299 U.S. 123,

[12] If common law practice did control, the modern rule most analogous to it would be that *only* federal courts of appeals could entertain new trial motions.

142. Appellate court review of a trial judge's refusal to order a new trial on the grounds of the excessiveness of the verdict has no impact on these essentials.

Nor does such review touch the fundamental "common-law distinction between the province of the court and that of the jury." *Baltimore & C. Line* v. *Redman*, 295 U.S. 654, 657. See also *Walker* v. *Southern Pac. R.R.*, 165 U.S. 593. Cf. *Neely* v. *Eby Const. Co.*, 386 U.S. 317, 322. The petitioner seeks only to insulate rulings of lower courts from appellate courts with respect to matters that have always been committed to the courts.

By putting forward an interpretation of the Seventh Amendment that has nothing to do either with one of the essentials of trial by jury or with the fundamental distinction between the province of courts and juries, the petitioner ignores numerous modern holdings concerning appellate action on new trial motions. (I.B. *supra*). He also disregards the flexibility this Court has perceived in the Seventh Amendment in the many decisions that have sanctioned procedural reforms despite their lack of precise forebears in common law practice. *Gasoline Prods. Co.* v. *Chaplin Ref. Co.*, *supra*, (allowing partial new trials with respect to damages only); *Galloway* v. *United States*, *supra*; *Baltimore & C. Line* v. *Redman*, *supra*, (directed verdicts and judgments notwithstanding the verdict); *Walker* v. *Southern Pac. R.R.*, *supra*, (directed verdicts when answers to special interrogatories are inconsistent with the general verdict); *ex parte Peterson*, 253 U.S. 300, (auditors to make preliminary findings and reports).

Moreover, the petitioner is unable to cite any authority at common law with respect to judicial review of

remittiturs, since remittiturs themselves were virtually unknown prior to the adoption of the Seventh Amendment. *Dimick* v. *Schiedt,* 293 U.S. 474, 484, 494. It was, in fact, Mr. Justice Story, whose opinion in *Parsons* v. *Bedford,* 3 Pet. 433, the petitioner relies upon as setting forth an immutable principle of law under the Seventh Amendment, who in *Blunt* v. *Little,* Fed. Cas. No. 1,578 (C.C.D. Mass. 1822), initiated remittitur practice by a creative use of English common law precedent. To speak, therefore, of limitations which pre-Seventh Amendment common law practice lays upon review of remittiturs is to take the contradictory position of admitting sufficient flexibility under the Amendment for the development of remittiturs, while denying that flexibility with respect to their review.

D. No Considerations of Judicial Policy Support the Petitioner's Analysis of the Seventh Amendment.

The petitioner argues that sound judicial policy stands against allowing appellate review of district judges' decisions on remittiturs.[13] He raises the spectre of courts of appeals deciding cases by tenuous unrealities and argues that this Court would be swamped with review of these difficult decisions if it recognizes the appellate power claimed by the respondent here.

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[13] The petitioner cites as "the leading authority today" 3 Barron & Holtzoff, *Federal Practice & Procedure* § 1302.1, at 355 (Rules ed. 1960), for the proposition that review of a trial judge's decision that a verdict is not contrary to the "clear weight of the evidence .... does not seem consistent with the Seventh Amendment." However, that treatise clearly distinguishes between new trials on grounds that a verdict is contrary to the weight of the evidence and issues involving the size of the verdict. *Id.* at 352. Moreover, another "leading" authority holds that the Seventh Amendment does not bar appellate review of new trial motions based upon the excessiveness of a jury award. 6A Moore, *Federal Practice* ¶ 59.08 [6], at 3827-28.

As pointed out earlier, p. 13 *supra,* all eleven federal Courts of Appeals have decided that some measure of review is needed over trial judges' refusals to order remittiturs or new trials when the jury has returned an excessive or an inadequate verdict. These decisions and the practice under them unequivocally refute the contention that the courts are or will be unable to administer the appellate power at issue in this case. And this Court through its certiorari policy has avoided painstaking factual reviews of damage awards. There is no reason to believe that its practice would be different in the future.

Moreover, having a wider perspective on damage cases generally than trial courts, the courts of appeals are especially well-suited for judging remittitur issues. Thus, in determining the question of law as to whether a jury's award is sustainable upon any reasonable view of the evidence, the courts of appeals can have useful recourse to the many other tort cases that have come before them.

Finally, the insulation of trial judges from appellate review might have adverse effects on areas of law in which this Court has relied upon new trial motions to limit the impact of excessive jury awards. See *e.g., Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 160.

II. THE DECISION BELOW IS NOT INVALID UNDER THE PROVISIONS OF THE FEDERAL EMPLOYERS' LIABILITY ACT.

The petitioner argues that even if it is assumed that the action of the court below was not prohibited by the Seventh Amendment its action is nonetheless invalid because appellate review under the FELA "is so narrowly limited that 'abuse of discretion' . . . is not an

authorized ground for appellate intervention." (Br. 22-25).[14]

To support this argument petitioner cites a line of cases that he asserts shows that "this Court has consistently reversed every appellate interference with a jury verdict, unless there was a complete absence of supporting evidence." (Br. 23). He then argues that the court below disregarded the teaching of these cases by "subjectively" determining that the amount of the verdict was excessive and by holding on that basis that the trial court had abused its discretion.

It should be observed at the outset that the cases cited by petitioner do not hold or even imply that the FELA enacts special rules of appellate procedure or imposes peculiar limitations upon the powers of appellate courts to review the action of trial courts. Indeed, it has been stated that "the system of judicial supervision still exists in [FELA] . . . as in other types of cases." *Harris* v. *Pennsylvania R.R.*, 361 U.S. 15, 17 (Mr. Justice Douglas, concurring). It is significant that in five of the cited cases this Court reversed the appellate court for affirming the action of

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[14] Petitioner begins this argument by quoting the Court's statement in Dice v. Akron C. & Y. R.R., 342 U.S. 359, 363 that "the right to trial by jury is a 'basic and fundamental feature of federal jurisprudence'" and is "part and parcel of the remedy afforded railroad workers under the Federal Employers' Liability Act." This general proposition does not advance petitioner's argument. His rights to a jury trial are no greater under the FELA than they are under the Seventh Amendment. Minneapolis & St. L. R.R. v. Bombolis, 241 U.S. 211. And we have shown in Part I above that the action of the court below did not violate the Amendment.

the trial judge.[15] These decisions do not draw any artificial distinction between the authority of appellate and trial courts, but on the contrary deal with the respective functions of court (whether trial or appellate) and jury under the FELA. It follows that these decisions and the argument that petitioner seeks to extract from them must be appraised in those terms, not in terms of some limitation upon appellate power as petitioner suggests.

The statements in the opinions cited by the petitioner should be read in context and with attention to the issue before the Court in those cases. All of these cases deal with the quantum of evidence required to establish substantive liability under the FELA. Although that Act speaks in terms of "negligence", it is now well recognized that the liability it imposes upon employers approaches the absolute. As the statute has been interpreted and applied by the courts, no showing of negligence in the historic sense is required, but on the contrary slight action or failure of action on the part of the employer is sufficient to establish substantive liability under the statute. Since little proof is required to establish liability, it is not surprising that the courts when dealing with the question of the amount of evidence required to support a verdict on liability have often said that a small amount of evidence will suffice to sustain a jury's verdict.

It does not follow, however, that these cases lay down any principle that the statute dispenses with the

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[15] Tiller v. Atlantic Coast Line R.R., 318 U.S. 54; Wilkerson v. McCarthy, 336 U.S. 53; Stinson v. Atlantic Coast Line R.R., 355 U.S. 62; Harrison v. Missouri Pac.R.R., 372 U.S. 248; Basham v. Pennsylvania R.R., 372 U.S. 699.

need for a rational relationship between the evidence and the amount of a verdict. The decisions of the courts interpreting and applying the statute so as to impose strict liability upon an employer rest upon a judicial determination that Congress intended that substantive liability imposed by the statute should not be qualified or cut down by common law doctrines relating to negligence or to the rights and obligations of masters and servants. But this Court has never held, and we submit that nothing in the statute would support a holding, that Congress intended the strict substantive liability imposed by the FELA on employers should be accompanied by the kind of unlimited accountability for damages for which petitioner contends. Indeed, if the matter were to be viewed as one of legislative policy, it might reasonably be assumed that strict or nearly absolute substantive liability does not diminish but instead increases the need for at least a limited degree of judicial control over the size of verdicts.[16]

If petitioner's argument were sound it could not be confined in its application, as petitioner seeks to do, to the power of appellate courts but would apply with equal logic and force as a limitation upon the power of trial courts in cases arising under FELA. The petitioner does not embrace this logical consequence of his argument and for good reason. This Court has recognized in cases arising under the FELA that the trial court has the authority to require a remittitur if it believes that a verdict is excessive as a matter of

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[16] State workmen's compensation plans frequently embody a schedule setting forth the precise damage recoveries that can be had for all possible work-related injuries. See *e.g.*, N.Y. Workmen's Compensation Law § 15.

law. *Union Pac. R.R.* v. *Hadley,* 246 U.S. 330, 334; *Neese* v. *Southern Ry.,* 350 U.S. 77.[17] Indeed, in the latter case this Court recognized that a court of appeals has the authority to order a new trial or a remittitur in any case in which the record would justify the conclusion that the trial court's failure to do so was an abuse of discretion.

We submit, therefore, that the decision of the Court of Appeals is not invalid under the FELA. In reviewing the action of the District Court, the court below applied a standard that was both rigorous and not inconsistent with the principles laid down in the decisions of this Court interpreting and applying the FELA.[18] Petitioner's argument to the contrary mis-

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[17] Lower federal courts and state appellate courts have frequently employed remittiturs in FELA cases. See Munson v. Long Is.R.R., 191 F. Supp. 748 (E.D.N.Y. 1961); Flusk v. Erie R.R., 110 F. Supp. 118 (D.N.J. 1953); Fornwalt v. Reading Co., 79 F. Supp. 921 (E.D. Pa. 1948); Jennings v. Chicago, R.I.&P.Ry., 43 F.2d 397 (D. Minn. 1930); Hammond v. Pennsylvania R.R., 15 F.2d 66 (W.D.N.Y. 1926), *aff'd,* 18 F.2d 1020 (2d Cir. 1927); Pitrowski v. New York, C.&St.L.R.R., 6 Ill. App. 2d 495, 128 N.E.2d 577 (1955); Thompson v. Jason, 265 S.W.2d 920 (Tex. Civ. App. 1954); Louisville & N.R.R. v. Stephens, 298 Ky. 328, 182 S.W.2d 447 (1944); Sibert v. Litchfield & M.Ry., 159 S.W.2d 612 (Mo. 1942).

[18] In suggesting that the court below should have applied a special standard of review since this case arose under the FELA, the petitioner ignores a consistent line of federal cases in which appellate courts reviewing FELA verdicts have applied the same standard that they would use in other civil cases. See Boston & Maine R.R. v. Talbert, 360 F.2d 286 (1st Cir. 1966); Russell v. Monongahela Ry., 262 F.2d 349 (3d Cir. 1958); Thomas v. Conemaugh & B.L.R.R., 234 F.2d 429 (3d Cir. 1956); Atlantic Coast Line R.R. v. Anderson, 267 F.2d 329, 333 (5th Cir. 1959), *cert. denied,* 361 U.S. 841; St. Louis S.Ry. v. Ferguson, 182 F.2d 949, 954-56 (8th Cir. 1950); Chicago R.I.&P.Ry. v. Kifer, 216 F.2d 753, 756-57 (10th Cir. 1954), *cert. denied,* 348 U.S. 917.

conceives and misstates the basis upon which the court below acted.

As the opinion of that court states, it applied the standard that it had previously enunciated in *Dagnello* v. *Long Island R.R.*, 289 F.2d 797 (1961). It accepted the ultimate facts established by the petitioner's evidence and it gave the judgment of the trial court and the petitioner "the benefit of every doubt". But having done this the court concluded that there was no evidence that in a rational manner could justify a verdict in excess of $200,000. In short, having resolved all doubts and inferences in favor of the petitioner and accepting all of his evidence, the court held that there could be no rational relationship between the evidence and a verdict of $305,000 and that accordingly the verdict was excessive as a matter of law.

When the petitioner argues that the FELA prohibits an appellate court from exercising this kind of limited review over the action of a trial court in denying a motion for a new trial on the ground that the verdict is excessive, he is in effect arguing that under the statute there need be no reasonable relationship whatsoever between the evidence and the amount of the verdict. Thus, petitioner's view of the law is that any injury no matter how small will justify any verdict no matter how large. We submit that the decisions of this Court do not require or sanction this result.

III. THE JURY'S $305,000 DAMAGE AWARD TO PETITIONER WAS ON THE UNDISPUTED FACTS IN THIS CASE EXCESSIVE, AND JUSTIFIED THE COURT OF APPEALS' ACTION IN ORDERING A REMITTITUR OR A NEW TRIAL.

In evaluating the jury's damage award, which exceeded by $55,000 the $250,000 demanded in the complaint, it is helpful at the outset to define precisely those elements of damage which are at issue. The petitioner claimed $27,000 for the wages he lost prior to trial. This sum, on the present appeal, raises no substantial question.

The two major elements of damage that raise the crucial issues now before the Court are those that the petitioner claimed for loss of future income and for the pain and suffering, past and future, which he claims has been and will be caused him by the injury.[19]

The basic facts with respect to petitioner's loss of future income due to his injury are clearly established. According to U.S. Life Tables, petitioner had a life expectancy at the time of trial of 27.5 years. (A.48). The petitioner states in his brief to this Court that he "has been totally and will be permanently disabled." (Br. 3, 25-26). However, the evidence was all to the contrary. For example, Dr. Cohen, the witness who the petitioner relied upon to establish the facts concerning his physical condition, had this to say:

> "The movement of all the toes is very bad, it is poor; and all in all he's got a poor functioning foot." (A.19).

* * *

[19] The Court should note that the petitioner did *not* allege that he bore the costs of the medical expenses incurred in his recovery. Thus, such costs sustain no part of the jury's award.

"Q. Is there any kind of work that you would recommend for a man with this type of disorder? A. I think a sedentary type job he should be safe, no one steps on his foot, if he keeps out of trouble.

"Q. A desk job in the railroad? A. Whoever has a desk job for him, I don't think it would make much difference, so long as he doesn't have to stand much and there is no chance of anyone stepping on his foot.

* * * * "Q. Well, what would your opinion be as to him working perhaps in some kind of capacity driving an automobile? Do you think he would be able to do that? A. I think he should be able to drive a passenger automobile, I wouldn't say a truck or anything like that." (A.23).

* * *

"Q. All I want to know now, Doctor, is, we are not faced with a man who is totally and completely disabled, are we? A. No, he can do sedentary work as I indicated." (A.24).

Thus, according to petitioner's own witness he was not totally disabled and would be able to maintain employment in a sedentary job or in a job that required him to drive an automobile. Indeed, the petitioner himself on direct examination testified that he had held a job for six months or a year prior to the trial. (A. 38-39). With this testimony from petitioner and his own witness, there was no basis in the record for the jury to award a sum for loss of future income on the ground that the petitioner was totally and permanently disabled.

Even assuming, however, that the petitioner never worked another day in his life, the maximum that the jury could have awarded for loss of future income

would be $100,000. The petitioner's income at the railroad was approximately $6,000 per year. (A. 48). The current yield on U.S. Treasury nine-month and one-year bills, virtually the safest and most liquid investment that can be had, has recently ranged from 5.663 percent to 6.086 percent. *The Wall Street Journal,* June 26, 1968, p. 25, col. 1. Thus, $100,000 placed in such an investment would yield approximately $6,000 per year.

Moreover, this income would accrue to the petitioner without any incursion into capital. Thus, at the end of his life he would have an estate of $100,000. The petitioner could not conceivably accumulate that sum while working for the railroad at his previous job or in any other foreseeable capacity.

The petitioner argues that his $6,000 per year salary would have increased in the future. Whatever weight this adds to the petitioner's case is more than offset by the consideration that living off the income of $100,000 allows him to keep that sum intact. The petitioner's argument is also offset by his testimony that he was able to secure employment prior to the trial and the testimony of his doctor that he was fit for future employment in various job capacities. Thus, $100,000 as compensation for loss of future income is extremely generous on this record.

To compare this figure with that actually awarded by the jury, the Court should consider that the $305,000 award given to the petitioner by the jury, invested at current short term government bond rates, would yield an annual income approaching $20,000 and allow him to pass an estate of nearly a third of a million dollars. If the petitioner chose not to maintain his capital intact,

he could, of course, have annual income substantially in excess of $20,000.

With $27,000 as a maximum figure for past lost wages and $100,000 as the maximum figure for loss of future income, the jury's award could be sustained only by holding that the pain and suffering that the petitioner has gone through and will go through justifies an award of $178,000. There is, of course, some evidence that the petitioner has had and will continue to have a certain measure of pain arising out of this injury. But not even the most favorable view of that evidence can justify an award of $178,000 as being reasonable compensation for the petitioner's pain and suffering.

The most persuasive item that the respondent can place before the Court is the testimony of the petitioner on direct examination as to the pain and suffering he has experienced. (A. 32-41). In summarizing, the petitioner stated:

> "Q. Now, you have indicated, as much as I feel it is necessary for you to, about the pain you have had in the foot. Has that pain been bearable so far as you are concerned up to the present time? A. Oh, yes. I mean, I just take it for granted now. It doesn't bother me now.
>
> "Q. And other than the increased discomfort that you have indicated in bad weather, has this pain up to now become much worse than it was before, or remained about the same? A. Remained about the same.
>
> "Q. Has it improved any? A. No, I don't think so." (A. 40-41).

This pain, changing with the weather, but now settled into a "bearable" (A. 40), "toothache"-like discomfort (A. 37) that the petitioner takes for granted,

might be compared to the pain of injuries such as football knee or tennis elbow that plague ex-athletes.[20] The jury gave him at least $178,000 for that pain. In doing so it rendered an award that was unsupportable upon any rational view of the evidence and the District Judge, therefore, erred as a matter of law in not setting it aside.

In determining the verdict that is reasonably supportable on the evidence in this case, it is useful to consider what other juries have awarded in similar cases and to consider the types of injuries that have been found by juries to justify the measure of recovery given to the petitioner in this case.

In an appendix to this brief the respondent has set forth a comprehensive summary of all decisions concerning damage awards returned against railroads and similar industries between May 1964 and April 1968, as collected in THE BULLETIN & THE CHRONICLE, a reporter published jointly by the American Association of Railroads and the National Association of Railroad Trial Counsel. The respondent invites the Court to examine this representative sample of awards to compare the $305,000 verdict which the petitioner in this case received for an injury to the toes on one foot with the awards returned both in similar and in vastly more serious cases. It is submitted that these decisions re-

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[20] Petitioner makes several ominous references to the possibility of future "amputation of the foot." (Br. 26, 27). Dr. Cohen did state that if the petitioner's pain became unbearable "the only thing to do is to remove a *portion* of the foot." (A. 19). (emphasis added). In view of the nature of the petitioner's injury, this testimony could refer only to an amputation of one or several toes. Moreover, the petitioner made it quite clear his pain was not unbearable (A. 40-41), and Dr. Cohen testified that the condition of the foot had improved at the time of trial. (A. 21-22).

veal that the jury's award in this case was grossly excessive.

Representative of cases where the plaintiff's injury was similar to or even more serious than the petitioner's are: *Kansas City So. Ry.* v. *Powell,* 411 S.W. 2d 633 (Tex. Civ. App. 1967) (FELA jury award of $76,000 to 44 year old fireman for functional loss of 50% of one leg); *Jones* v. *Chesapeake & O. Ry.,* 371 F.2d 545 (4th Cir. 1966) (FELA award of $97,660 for leg amputation and hip dislocation); *Miller* v. *Dewitt,* 208 N.E. 2d 249 (Ill. App. 1965) ($90,000 to one plaintiff for crushing of leg requiring insertion of permanent 6"-7" steel plate; $30,000 to co-plaintiff for fracture and impaction of heel resulting in permanent disability of foot). In none of the collected cases did a plaintiff receive an award approaching even the $200,000 recovery allowed by the Court of Appeals for an injury similar to the petitioner's.

There were only six cases in which the jury returned an award as high or higher than the petitioner's verdict here: *Henninger* v. *Southern Pac. Co.,* 59 Cal. Rptr. 76 (1967) ($650,000 for 29 year old conductor's loss of both legs above the knee, with evidence that he could never wear artificial limbs); *Cox* v. *Northwest Airlines, Inc.,* 379 F.2d 893 (D.C. Cir. 1967) ($329,956 for wrongful death of 29 year old husband and father, Captain in U.S. Army); *Zaninovich* v. *American Airlines, Inc.,* 262 N.Y.S. 2d 854 (Sup. Ct. 1965) ($755,000 to four children for wrongful death of both parents, father 29 earning $14,900 per year); *Thill* v. *Modern Erecting Co.,* 136 N.W. 2d 677 (Minn. 1965) ($642,400 to paraplegic; reduced by trial court to $375,000); *Robertson* v. *Rig-A-Lite Co.,* 394 S.W. 2d 838 (Tex.

Civ. App. 1965) ($500,000 to 31 year old man for loss of both hands and one leg); *Jines* v. *Greyhound Corp.*, 197 N.E. 2d 58 (Ill. App. 1964) ($400,000 for 21 year old father of two left completely paralyzed in lower extremities and nearly completely paralyzed in upper extremities).

CONCLUSION

The decision of the Court of Appeals that the petitioner must enter a remittitur of his verdict insofar as it exceeded $200,000 or face a new trial was correct. It rested upon a standard of review that is consistent with both the Seventh Amendment and the FELA. On the facts of this case, this standard was correctly applied. The District Judge erred as a matter of law, and thereby abused his discretion, in refusing to set aside the $305,000 verdict of the jury, there being no evidence, even when the petitioner was given the benefit of every doubt, that on any rational view could sustain that verdict.

The decision below should therefore be affirmed.

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